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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
RICHLAND DIVISION

UNITED STATES OF AMERICA,	:	CASE NO.: 4:19-CR-6036-SMJ
	:	
v.	:	DEFENDANT’S SENTENCING
	:	MEMORANDUM
	:	
TRENT DREXEL HOWARD,	:	
	:	
Defendant.	:	

Pursuant to the Court’s Order Regarding Schedule for Sentencing (ECF No. 140), Counsel for Defendant Trent Drexel Howard (“Mr. Howard”) hereby respectfully submits this Sentencing Memorandum. The Court’s order directed the parties to submit sentencing memorandums by December 16, 2021. A joint motion to extend the time for filing sentencing memorandums until December 23, 2021 has been contemporaneously filed by the Government. (ECF No. 143).

I. Base Offense Level and Enhancements

The PSIR calculates a total offense level of 43. (ECF No. 142, par. 202). Counsel contends that the 5-level enhancement under U.S.S.G. § 4B1.5(b)(1) is

1 improper and that the total offense level should therefore be 40. (ECF No. 142, par.
2 199).

3 This enhancement is warranted if (1) “the defendant’s instant offense of
4 conviction is a covered sex crime” and (2) “the defendant engaged in a pattern of
5 activity involving prohibited sexual conduct.” Mr. Howard was convicted of
6 *attempted* child pornography, and Counsel contends that this offense is not
7 included under “prohibited sexual conduct.”
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10 Application Note 2 defines “covered sex crime” as:

11 (A) an offense, perpetrated against a minor, under (i) chapter 109A of
12 title 18, United States Code; (ii) chapter 110 of such title, not including
13 trafficking in, receipt of, or possession of, child pornography, or a
14 recordkeeping offense; (iii) chapter 117 of such title, not including
15 transmitting information about a minor or filing a factual statement
16 about an alien individual; or (iv) 18 U.S.C. § 1591; or (B) an attempt or
a conspiracy to commit any offense described in subdivisions (A)(i)
through (iv) of this note.

17 (emphasis added).
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19 Application Note 4(A) defines “prohibited sexual conduct” as:

20 (i) any offense described in 18 U.S.C. § 2426(b)(1)(A) or (B); (ii) the
21 production of child pornography; or (iii) trafficking in child
22 pornography only if, prior to the commission of the instant offense of
23 conviction, the defendant sustained a felony conviction for that
trafficking in child pornography. It does not include receipt or
possession of child pornography.

24 (emphasis added).
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26 Subsection (B) of Application Note 2 specifically includes attempt offenses.

27 Application Note 4(A), however, does not include the word “attempt” and explicitly
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1 includes “the production of child pornography.” For this reason, “prohibited sexual
2 conduct” does not include the offense of *attempted* production of child pornography,
3 and therefore, the 5-level enhancement should not apply in Mr. Howard’s case.
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5 Alternatively, the rule of lenity should apply, because the definitions are
6 ambiguous as to whether *attempted* production of child pornography is prohibited
7 sexual conduct. *See, United States v. Edling*, 895 F.3d 1153, 1158 (9th Cir. 2018),
8 finding: “The rule of lenity instructs that, where a statute is ambiguous, courts
9 should not interpret the statute so as to increase the penalty that it places on the
10 defendant... the rule of lenity is predicated on the view that courts should be
11 hesitant to impose criminal penalties unless it is clear that the legislature intended
12 such punishment to be available.” (citations and quotations omitted).
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15 Here, it is not clear that *attempted* production was to be included, and for
16 this reason, the rule of lenity should void the 5-level enhancement.¹
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18 **II. Departures**

19 Counsel for Mr. Howard will not be advocating for any departures at the
20 sentencing hearing.
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25 ¹ Counsel notes that these arguments have been rejected by the Eighth Circuit. *See,*
26 *United States v. Morgan*, 842 F.3d 1070 (8th Cir. 2016).
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1 **III. 18 U.S.C. § 3553(a)**

2 Under 18 U.S.C. § 3553(a), district courts are directed to impose “a sentence
3 sufficient, but not greater than necessary,” in consideration of several factors,
4 including the nature and circumstances of the offense, the history and
5 characteristics of the defendant, the need for the sentence imposed to provide the
6 defendant with needed medical care in the most effective manner, and the need to
7 provide just punishment and afford deterrence. These factors warrant a sentence
8 below the Advisory Guidelines range. Pursuant to the plea agreement, the parties
9 have agreed that 23 years of incarceration is the appropriate disposition.
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11 i. The nature and circumstances of the offense

12 The PSIR details that Mr. Howard covertly recorded minors. Mr. Howard,
13 however, did not profit from this conduct nor did he distribute these recordings to
14 others. Mr. Howard also did not touch, force, or coerce any minors. The 14
15 individuals listed in the PSIR did not become aware of the recordings until the
16 Government began its investigation. (ECF No. 142, p. 8-10).
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18 Mr. Howard has since accepted responsibility for his actions and entered a
19 plea of guilty. Counsel also notes that prior to the plea agreement Mr. Howard
20 requested a bench trial, in part, to minimize the impact on the 14 individuals listed
21 in the PSIR as well as any potential jurors.
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1 ii. History and characteristics of the Defendant

2 Mr. Howard is 50 years old. Prior to this case, he had never been arrested.
3 (ECF No. 142, par. 208-209). His sister, Cori Montalvo, describes him as likeable
4 and hardworking. (*See*, Exhibit 1). She notes that Mr. Howard has always
5 maintained steady employment and that he often worked overseas “*with a grueling*
6 *schedule and under very difficult conditions.*” She notes that, “[*h*]e made those
7 *sacrifices to provide a good life for his family.*”
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10 Ms. Montalvo chronicles the treatment Mr. Howard suffered while he was
11 detained in Kazakhstan for more than a year, including witnessing beatings and
12 suicides. She explains that he agonizes over the fact that he will likely not be
13 released before his mother passes. And she notes Mr. Howard’s plans if he is
14 released from prison one day: “*I believe he will be able to find work easily. He is*
15 *skilled in automotive repair and many construction trades... My husband and I will*
16 *welcome Trent into our home for as long as he needs.*”
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19 Upon release, it is Mr. Howard’s desire is to be a productive member of
20 society. His plan is to live with his sister and do his best to find meaningful
21 employment. And while Mr. Howard’s PSIR notes that he has struggled with
22 alcohol abuse, Mr. Howard welcomes any forms of treatment the Bureau of
23 Prisons finds appropriate. (ECF No. 142, par. 244, 245, 250).
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1 iii. Provide just punishment and afford deterrence

2 The COVID-19 pandemic has had a significant impact on the country's
3 criminal justice system, including in the context of criminal sentencing. Courts
4 have found that the balance of sentencing factors under § 3553(a) “weighs
5 differently in the current circumstances.” *United States v. Ozols*, 2020 WL
6 2849893, at *2 (S.D.N.Y. June 2, 2020). In cases where inmates have filed motions
7 for early release from prison, the DOJ has instructed prosecutors to concede that
8 inmates “who present certain CDC risk factors, including Type 2 diabetes and
9 hypertension, automatically establish extraordinary and compelling circumstances”
10 warranting early release from prison. *United States v. Brown*, 2020 WL 5116781,
11 at *4 (S.D. Fla. Aug. 31, 2020).
12

13 As a 50-year-old man with several pre-existing medical conditions,
14 including chronic respiratory conditions, Mr. Howard is especially at risk of
15 contracting a severe illness from COVID-19. The CDC and other public health
16 experts have warned that the risk of severe or fatal illness from COVID-19
17 increases with age, with individuals in Mr. Howard's age group (50 to 64) being
18 four times more likely to require hospitalization than the 18-29 age group and 25
19 times more likely to die from complications.²
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26 ² [https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html)
27 [discovery/hospitalization-death-by-age.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html)
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1 Mr. Howard also has several pre-existing medical conditions, including
2 chronic obstructive pulmonary disease (“COPD”), asthma, and high blood
3 pressure. (*See*, Exhibit 2, redacted medical records from January 3, 2019).
4
5 Public health experts have identified at least COPD and asthma as putting
6 individuals at an increased risk of severe illness from COVID-19.³

7 Being incarcerated also puts Mr. Howard at greater risk. Since the beginning
8 of the pandemic, more than 40,000 federal inmates and more than 8,000 BOP staff
9 have contracted COVID-19.⁴ In fact, the DOJ’s concession that inmates with pre-
10 existing conditions present “extraordinary and compelling reasons” warranting
11 release from prison “is based on the notion that, while in prison, a defendant
12 cannot socially distance from others...” *United States v. Coffman*, 2020 WL
13 6384406, at *2 (E.D. Ky. Oct. 29, 2020) (citations omitted). For these reasons, the
14 heightened danger to Mr. Howard’s health should be taken into consideration when
15 deciding if the sentence affords just punishment and deterrence.
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19 Moreover, as the Court is well aware, Mr. Howard spent more than 400 days
20 in a Kazakh detention facility. That detention occurred during a global pandemic
21 and in a place where Mr. Howard did not speak the language; he was unable to see
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25 ³ [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
26 [medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)

27 ⁴ <https://www.bop.gov/coronavirus/>;
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1 his family; he could not meet with his American lawyer; he lost a significant
2 amount of weight; he threatened self-harm; and he was denied medication. Counsel
3 contends that serving time under such circumstances is far more severe than the
4 conditions to which most inmates in America are subjected. The harshness of the
5 time served in Kazakhstan should also be considered when deciding if the sentence
6 provides for a just punishment and affords deterrence.
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8 **IV. Supervised release**

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10 While the parties have agreed to a 23-year custodial sentence, the parties
11 have not agreed to a term of supervised release. Counsel contends that the
12 minimum amount (5 years) is warranted, considering Mr. Howard's age upon
13 release, medical conditions, and lack of criminal history. Mr. Howard will also be
14 monitored for life through the sex offender registry.
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This 23rd day of December, 2021.

ARMSTRONG & JAMESON, P.S.

Attorney for Defendant

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This 23rd day of December, 2021.

/s/ Jess B. Johnson

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